IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
PROMEDCO OF LAS CRUCES, INC., *et al.*,	§	**Case No. 00-46863-BJH-11**
	§	
Debtor.	§	**Jointly Administered**
	§	
	§	
PROMEDCO OF SOUTHWEST FLORIDA, INC.,	§	
Plaintiff,	§	
	§	
v.	§	**Adv. Pro. No. 02-4075**
	§	
WENDY S. HUMPHREY, M.D.,	§	
	§	
Defendant.	§	
	§	

MEMORANDUM OPINION

Before the Court is the Motion for Summary Judgment (the "Motion") filed February 18, 2003 by Wendy S. Humphrey, M.D. ("Dr. Humphrey"), seeking summary judgment on all of the claims asserted by Promedco of Southwest Florida, Inc. ("PMC-SW") in its Complaint filed April 24, 2002 (the "Complaint"). The Motion was argued June 4, 2003. At the conclusion of that hearing, the Court directed counsel for Dr. Humphrey to search for and produce any additional documents responsive to PMC-SW's earlier discovery requests. If additional documents were produced, the Court gave PMC-SW time to supplement the summary judgment record. On June 30, 2003, PMC-SW supplemented the record after receiving certain additional documents. The Court took the Motion under advisement at that time.

The Court has core jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (E). This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

For the reasons explained below, and after careful consideration of the pleadings, the evidence, and the arguments of counsel, the Court concludes that: (i) Dr. Humphrey is entitled to a summary judgment on PMC-SW's wage overpayment (and unjust enrichment) claim, the first fraud claim and the second fraud claim,[1] the claim for willful violation of the automatic stay, and the attorneys' fees claim, and (ii) Dr. Humphrey is not entitled to a summary judgment on PMC-SW's conversion claim and the turnover and accounting claims.[2]

I. Background

This case presents legal issues arising from the complex problems associated with medical billing, insurance reimbursements, and physician distributions, complicated by the practical fact that in the regular course of things, babies are not born until nine months after conception.

A. Factual Background

PMC-SW is a physician practice management company and wholly-owned subsidiary of ProMedCo Management Company ("PMC"). Both entities are debtors in the jointly administered ProMedCo of Las Cruces, Inc. bankruptcy case pending in this Court. Prior to their bankruptcy filings, PMC and PMC-SW entered into a business transaction in April of 1997 with Naples Medical

[1]The first fraud claim is defined *infra* at p. 27. The second fraud claim is defined *infra* at p. 28.

[2] The parties stipulated to a dismissal of counts three and four of the Complaint, which consisted of fraudulent conveyance and fraudulent transfer claims. *See* Order of Dismissal of Claims, entered July 8, 2003. The parties also agreed to settle PMC-SW's claim that Humphrey converted office equipment, which was contained in count two of the Complaint.

Center ("NMC"), and Naples Obstetrics & Gynecology M.D. P.A. ("NOG") (collectively, "the Clinic"). PMC-SW acquired the assets of the two medical practices in Naples, Florida, and PMC-SW and NMC entered into a 40-year management services agreement (the "Service Agreement").[3] In December of 1997, Dr. Humphrey signed an employment agreement (the "Employment Agreement") with NMC. The Employment Agreement provided that her compensation would be calculated pursuant to her individual contribution to the Clinic's earnings, subject to reconciliation as provided in the Service Agreement. *See* Humphrey Exhibit 2, Employment Agreement, recital C, ¶ 4(a)(i), (b); Humphrey Exhibit 1, Service Agreement, ¶ 11.10, 11.1.

Under the Service Agreement, PMC-SW became the sole and exclusive manager and administrator of all non-medical functions related to the Clinic; and in exchange, PMC-SW would receive a management fee of 15% of the Clinic's net revenue. *See* Service Agreement, ¶¶ 3.1, 11.7, 11.17. In addition, on the 15th of each month, PMC-SW purchased (and then attempted to collect) the Clinic's previous month's accounts receivable. *See* Service Agreement, ¶¶ 7.2, 7.4. As the consideration for the purchase of the Clinic's receivables, PMC-SW would pay cash equal to the previous month's net distribution to the Clinic plus or minus adjustments relating to the prior month (the "Clinic Distribution"). *See* Service Agreement, ¶ 7.4. The Clinic Distribution was then distributed to the physicians in direct proportion to the receivables generated by each physician. *See* Employment Agreement, recital C.[4]

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[3]Pursuant to this transaction, the NOG-physicians joined NMC.

[4]For example, once the cycle was in operation, assume the Clinic generated $100,000 of receivables in one month, and the appropriate historical adjustment was $10,000. Under the agreements, the $100,000 would be adjusted to $90,000 based on historical collection risk. If the Clinic incurred $40,000 in expenses in that month, $50,000 would remain. The 15% management fee (15% of $50,000, or $7,5000) would be taken out leaving $42,500 to distribute to the Clinic as the "Clinic Distribution." This $42,500 would supply the consideration for the purchase of the month's receivables. Once the Clinic Distribution was paid, the Clinic would distribute the funds to

In accordance with the terms of the Service Agreement, PMC-SW retained the right to reconcile its estimated monthly adjustments (the estimate reflected historical collections) to the Clinic Distribution based on actual collections. However, the Service Agreement states that the reconciliation is to be performed quarterly. *See* Service Agreement, ¶ 11.1. Thus, on a quarterly basis, PMC-SW had the right to deduct from or add to the revenue calculation to correct any underestimation or overestimation in the prior quarter. As noted previously, Dr. Humphrey's compensation was also subject to this quarterly reconciliation process.[5]

NMC employed Dr. Humphrey between December 1997 and February 2001. PMC-SW asserts that during her employment, despite the monthly adjustments made to the Clinic Distribution, PMC-SW experienced a substantial shortfall in collecting the accounts receivable that Dr. Humphrey generated. According to PMC-SW, when it attempted to recover approximately $522,000 in actual adjustments from her (calculated over the entire duration of her employment), she resigned. *See* Complaint, pp. 7-8, ¶¶ 21-22.[6]

In addition, because of Dr. Humphrey's resignation, PMC-SW alleges that it was not able to collect certain insurance reimbursements owed to PMC-SW relating to Dr. Humphrey's obstetrics

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the physicians based on each doctor's individual contribution.

[5]According to PMC-SW, this quarterly reconciliation process created accounting problems and a significant economic loss for it. Adjustments for uncollectible accounts and/or insurance reimbursements could be delayed for months. In the context of Dr. Humphrey's obstetrics practice, this delay between distributions and adjustments was exacerbated by the nine-month pregnancy period. In short, from PMC-SW's perspective, the quarterly reconciliation process did not capture the needed adjustments to the Clinic Distributions. *See* PMC-SW Exhibit 4, Motion to Compel, p. 3; PMC-SW Exhibit 1, (the "Estes Affidavit"), ¶ 4; Humphrey Exhibit 4, (the "Estes Deposition"), p. 77.

[6]Dr. Humphrey agrees in part. According to her affidavit, "my decision to terminate my employment was not made until February 2001 and was a result of my belief that NMC had breached its contract with me." Humphrey Exhibit 3, ¶ 7 (the "Humphrey Affidavit"). She further testified that the "decision to terminate my employment contract with NMC was, in part, driven by the fact that NMC sought to unilaterally reconcile my salary for a period of time far exceeding the quarterly reconciliation basis set forth in my employment contract." Humphrey Affidavit, ¶ 7.

patients. According to PMC-SW, upon a pregnant patient's first visit to Dr. Humphrey, a $3,000 receivable was generated (a "global fee" for the entire range of services to be provided for prenatal and postnatal care, as well as the actual delivery). Dr. Humphrey would be compensated by NMC in the next month based on that generated receivable, or "booked global fee." Thus, according to PMC-SW, Dr. Humphrey would be compensated for the full range of obstetrics services to be provided for the next several months (through delivery of the baby) prior to her completion of those services.[7] However, according to PMC-SW, the insurance company was not actually billed until the completion of the services – *i.e.*, until after the baby's delivery, some several months later. So, according to PMC-SW, if a patient saw Dr. Humphrey for her initial obstetrics visit when Dr. Humphrey was a NMC-employee but delivered the baby after Dr. Humphrey resigned, NMC had already compensated Dr. Humphrey for the $3,000 receivable that PMC-SW had purchased but not yet billed to the insurance company. PMC-SW alleges in the Complaint that after she resigned, Dr. Humphrey intentionally submitted insurance claims to the insurance companies for patients on accounts for which Dr. Humphrey had already been compensated pursuant to the Employment Agreement and the Service Agreement.

To further complicate the accounting problems, Dr. Humphrey was allowed to remain on site at NMC after her resignation and she continued to practice at the Clinic facilities for another eleven months. *See* PMC-SW Exhibit 2, ("Humphrey Deposition"), p. 12. Moreover, while Dr. Humphrey became responsible for her patient charges and billing, her patient charges continued to be recorded

[7]Dr. Humphrey disputes that a "global fee" was booked upon an obstetric patient's initial visit. According to her affidavit, "for most medical services provided by me, an actual invoice or accounts receivable [sic] is not generated until the conclusion of the services provided." Humphrey Affidavit, ¶ 6. Dr. Humphrey asserts that there is a global fee "established pursuant to the contract between the medical practice and the health insurance company," but that "such fee is not billed for until the baby is delivered." *Id.*

in the NMC computer system. *See* Estes Deposition, p. 37. As an NMC-employee, Dr. Humphrey's patient charges were billed under "Doctor # 7" in the NMC computer system. After her resignation, Dr. Humphrey's charges were billed under "Doctor # 77" in that system. *See* PMC-SW's Brief in Opposition to Dr. Humphrey's Motion for Summary Judgment ("PMC-SW Brief"), p. 5. PMC-SW alleges that Dr. Humphrey changed the code in order to convert the receivables.

B. Procedural Background

As originally filed, the Complaint contained nine counts: (1) turnover under 11 U.S.C. § 542; (2) conversion of accounts receivable and equipment;[8] (3) voidable transfer/fraudulent conveyance under 11 U.S.C. § 548; (4) avoidance of fraudulent transfer under 11 U.S.C. § 544(b);[9] (5) accounting under 11 U.S.C. § 542(a); (6) fraud; (7) unjust enrichment;[10] (8) willful violation of the automatic stay under 11 U.S.C. § 362; and (9) attorneys' fees. *See* Complaint. Dr. Humphrey's Original Answer filed on May 24, 2002 contained a demand for a jury trial. At the same time, Dr. Humphrey also filed a Motion to Withdraw the Reference. Sitting by special designation, Judge D. M. Lynn issued an opinion recommending that the reference be withdrawn when the adversary was ready for trial.[11] The district court, by Order entered August 9, 2002, adopted the report and ordered that once the district court receives documentation from either party that the bankruptcy court has

[8]As noted above, the parties settled the conversion of equipment claim.

[9]As noted above, PMC-SW agreed to dismiss the fraudulent conveyance and fraudulent transfer claims. *See* Order of Dismissal of Claims, entered July 8, 2003.

[10]PMC-SW's claim of unjust enrichment is based on alleged overpayments of compensation over the life of Dr. Humphrey's employment. This count will be referred to hereinafter as the "wage overpayment" claim.

[11]Judge Lynn specifically held that Dr. Humphrey was entitled to a jury trial on the fraudulent transfer claims, but that if the jury trial issue becomes moot, withdrawal of the reference may be reconsidered. *See* Report of Status Conference on Motion to Withdraw Reference. Because those claims were dismissed, reconsideration of the withdrawal of reference is appropriate. Upon motion by PMC-SW, the Court will reconsider the earlier recommendation.

certified that the parties are ready for trial, the reference will be withdrawn.[12]

Dr. Humphrey filed the Motion on February 18, 2003. PMC-SW filed its Response on March 10, 2003. Dr. Humphrey filed a Reply on May 7, 2003, and PMC-SW filed a Surreply on May 12, 2003. Both parties moved to strike portions of the other's evidence and pleadings, as well as asserted that the other party's pleadings violated certain Local Rules. At the hearing on June 4, 2003, the Court ruled that any argument not expressly addressed at the hearing would be waived. Both parties withdrew their "technical" objections to the pleadings. However, Dr. Humphrey renewed her evidentiary objections to the Estes Affidavit.

As to the legal contentions, Dr. Humphrey argues that she was employed by NMC, not PMC-SW, and thus there is no direct contractual relationship between PMC-SW and her. PMC-SW counters with an Assignment of Claims dated December 18, 2002 by and between NMC, PMC, and PMC-SW (the "Assignment"). *See* PMC-SW Exhibit J. This document memorializes NMC's assignment of "all claims and causes of action which have accrued to NMC prior to this Assignment against Wendy Humphrey, M.D. [] arising under the Employment Agreement . . . " to PMC and PMC-SW. PMC-SW Exhibit J. Thus, PMC-SW now argues that it has a contractual claim against Dr. Humphrey for wage overpayment based on the Assignment. In addition, PMC-SW relies on the legal theory of unjust enrichment as another basis for recovery of the alleged overpayments.

In response, Dr. Humphrey contends that PMC-SW, as a third party, cannot assert a "wage overpayment" claim based on overpayments on a contract between NMC and Dr. Humphrey. As to the Assignment, Dr. Humphrey discredits the document because it was entered into eight months

[12]As a pre-trial motion, the Motion is properly decided by this Court even if the reference is withdrawn later.

after the Complaint was filed. Moreover, Dr. Humphrey contends that since the Employment Agreement only gives NMC (or PMC-SW as its assignee) the right to reconcile her wages quarterly, by the time the Complaint was filed the request for reconciliation was untimely.

As to the conversion claim, Dr. Humphrey argues that there is no genuine issue of material fact because PMC-SW's expert's evidence is inadmissable and without the expert's testimony, PMC-SW has no evidence of damages. As to PMC-SW's remaining claims: turnover and accounting, fraud, and willful violation of the automatic stay, Dr. Humphrey argues that there is no evidence to raise a genuine issue of material fact and that summary judgement in her favor is also appropriate.

II. Legal Analysis

A. Summary Judgment Standard

Summary judgment is proper if the summary judgment record shows that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(b); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Abbot v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). The summary judgment movant:

> [N]eed not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial.

Epps v. CNM Texas Nat'l Bank, 838 F. Supp. 296, 299 (N.D. Tex.), *aff'd* 7 F.3d 44 (5th Cir 1993) (citing *Celtox Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "[U]nsubstantiated assertions are not

competent summary judgment evidence." *Abbott,* 2 F.3d at 619. The nonmoving party must "'come forward with specific facts showing there is a genuine issue for trial' . . . [and] must do more than simply show some 'metaphysical doubt as to the material facts.'" *Epps,* 838 F. Supp. at 299 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

In the summary judgment context, "the trial court has broad discretion to rule on the admissibility of the expert's evidence . . . ." *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1998); *Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000). Expert witness evidence that does not pass the *Daubert* test of evidentiary reliability is not competent summary judgment evidence. *See Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 382-83 (5th Cir. 1996) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 590 (1993)). The Fifth Circuit applies the *Daubert* test for relevance and reliability to more than purely scientific evidence, also applying *Daubert* to proposed expert testimony based on other specialized knowledge. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5th Cir. 1997). In other words, the Fifth Circuit tests all expert testimony for relevance and reliability. *See Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)).

B. The Claims

1. Threshold Issue – Evidentiary Objections to PMC-SW's Expert Opinion

As evidence of damages on both its conversion of accounts receivable claim and its wage overpayment claim, PMC-SW relies upon the Estes Affidavit. Mr. Richard Estes ("Estes") is currently the Chief Executive Officer ("CEO") of NMC. Prior to becoming the CEO of NMC, Estes was a Regional Vice President of PMC and also acted as an interim administrator for PMC-SW. *See* PMC-SW Response in Opposition to the Motion, p. 1; Estes Affidavit, ¶ 2. Dr. Humphrey argues

as a threshold issue that the Estes Affidavit is not competent summary judgment evidence. Specifically, she argues that Estes' expert testimony is not reliable evidence of damages because he failed to take into account known variables that would alter his damage calculation.

While the Court has broad discretion to rule on the admissibility of an expert's evidence, *see Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 331 (5th Cir. 1999); *Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000), for the purposes of summary judgment, "an expert affidavit must include materials on which the expert based his opinion, as well as an indication of the reasoning process underlying the opinion." *Boyd*, 158 F.3d at 331; *see also Hayter v. City of Mount Vernon*, 154 F.3d 269, 274 (5th Cir. 1998).

In his affidavit, Estes testifies that Dr. Humphrey converted the entire global fee amount for the patients who retained her as their OB-GYN after she terminated her employment with NMC. *See* Estes Affidavit, ¶¶ 13-18. Estes relies on reports prepared by a PMC employee, Jo Cera, to substantiate his opinion that because of Dr. Humphrey's departure and subsequent alleged individual collection and receipt of insurance reimbursements, PMC-SW was unable to collect insurance proceeds on the accounts receivable generated while Dr. Humphrey was a NMC employee. *See* Estes Affidavit, ¶ 18; *see also* Humphrey Appendix, Exhibit 5 ("Cera Deposition"). Specifically, Estes testifies that prior to her departure, Dr. Humphrey generated $201,125 of obstetrics charges, which when adjusted based on Dr. Humphrey's historical collection rate of 53.15%, *see* PMC-SW Exhibit 1(H), should have generated $106,897 of insurance proceeds due to PMC-SW.[13] Estes

[13]At the June 4, 2003 hearing, counsel for PMC-SW represented to the Court that since the filing of the Complaint, PMC-SW had recovered additional monies based on services provided by Dr. Humphrey, reducing the damage claim based on the conversion of the accounts receivable to $82,940.58. *See* PMC-SW Exhibit 1(I). The damage claim increased, however, in PMC-SW's Supplement. The Supplement contained additional insurance payment documents provided to PMC-SW after the June 4 hearing. The damage calculation contained in the Supplement increased the total to $85,750.00.

further testifies that PMC-SW could not collect these insurance proceeds because after she left, Dr. Humphrey submitted claims in her own name for these patients and was paid by the insurance companies on her claims. *See* Estes Affidavit, ¶¶ 14-18.

Dr. Humphrey argues that this testimony is inadmissible because Estes "has made no effort to reduce from such chart the patients that either terminated their relationship with HUMPRHEY and/or for those patients which NMC actually collected funds from." Humphrey's Objections to the Summary Judgment Evidence Offered by PMC-SW and Motion to Strike, p. 8. Dr. Humphrey also argues that Estes failed to adjust the amounts for the rates insurance companies would typically negotiate, *i.e.*, a $1,500 reimbursement for the $3,000 global charge. Moreover, Dr. Humphrey argues that Estes failed to break down the global fee into individual services so that it could be determined what amount of the $3,000 global fee Dr. Humphrey performed while a NMC-employee. Thus, according to Dr. Humphrey, Estes' opinion is based on unsound methodology and his testimony is inadmissible as unreliable expert opinion. Upon its exclusion, Dr. Humphrey contends that PMC-SW is left without evidence of damages on its conversion claim and she is entitled to summary judgment on that claim. *See* Humphrey's Objections to the Summary Judgment Evidence Offered by PMC-SW and Motion to Strike, p. 8.

For the reasons explained below, the Court overrules Dr. Humphrey's objection to the admissibility of the Estes Affidavit and denies the motion to strike, concluding that the Estes Affidavit is competent summary judgment evidence. The Estes Affidavit sets forth Estes' credentials and qualifications, *i.e.*, that he is currently the CEO of NMC, that he was regional vice president of PMC with responsibility for managing functions of PMC-SW, and that he was "familiar with the billing and collection procedures for calculation and distribution of physician compensation." Estes

Affidavit, ¶ 2. The Estes Affidavit also sets forth Estes' testimony as to the billing procedures used by NMC and PMC-SW based on his personal knowledge from his prior positions. This is sufficient to establish Estes' personal knowledge. *See, e.g., Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531, 544 n.13 (5th Cir. 2002) (not an abuse of discretion to consider affidavits based on personal knowledge obtained as result of employment position with the plaintiff); *FDIC v. Patel*, 46 F.3d 482, 484 (5th Cir. 1995) (employees qualified to speak from personal knowledge as to business records); *Fed. Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 702 (5th Cir. 1991) (vice president has personal knowledge as to statements in affidavit).

As an expert witness, however, Estes is not required to testify based upon his personal knowledge. *See* FED. R. EVID. 703; *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). An expert may rely on hearsay as long as the information is the type of information reasonably relied upon by experts in the field. *See Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 n.6 (5th Cir. 1994) ("Experts generally may rely on hearsay . . . if the data is reliable . . . ."). Attached to the Estes Affidavit are several reports (exhibits to the affidavit) which track the financial discrepancies allegedly associated with Dr. Humphrey.[14] Also attached to the Estes Affidavit are payment vouchers from insurance companies for monies that were paid directly to Dr. Humphrey. *See* PMC-SW Exhibit 1(F), (G). The patients' names on these vouchers match the patients' names formerly associated with Dr. Humphrey in NMC's billing records. Estes may rely on these documents to form his opinions because these documents are the type of documents upon which an expert would normally rely. *See, e.g., Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980)

[14]As to the conversion claim, *see* PMC-SW Exhibit 1(A), (F), (G), (I), (K). As to the wage overpayment claims, *see* PMC-SW Exhibit 1(B), (D), (E), (H).

(expert could rely on corporate financial statements and files to form opinion).

As to Dr. Humphrey's authentication objection, Estes authenticated the documents and verified that Exhibit I to his affidavit is a summary prepared at his direction of the voluminous billing records contained in the NMC/PMC-SW computer system. As an expert, Estes can rely on the report. *See Simpson v. James*, 903 F.2d 372, 378 n.20 (5th Cir. 1990) (trial court did not abuse its discretion in admitting into evidence information expert accountant compiled from internal corporate documents); *FDIC v. Patel*, 46 F.3d 482, 484 (5th Cir. 1995) (affidavits of employees familiar with bank records system and documents attached to affidavits were proper summary judgment evidence).

Because the Estes Affidavit sets forth Estes' credentials, the relevant facts upon which he relied, the basis of his personal knowledge of the facts, and the reasons for his conclusion that Dr. Humphrey billed and collected accounts receivable for which she had already been compensated, the Estes Affidavit is competent summary judgment evidence. While the trier of fact may ultimately disagree with his damage calculations or the weight to be given his testimony at trial, Estes' conclusions are not merely conjectures without evidentiary support. For all of these reasons, the Court finds that Estes' opinion is admissible as evidence of damages on PMC-SW's conversion claim and wage overpayment claim.

2. Conversion Claim

PMC-SW asserts a claim for conversion of accounts receivable against Dr. Humphrey. *See* Complaint, p. 7. Under Florida law, "conversion is an 'act of dominion wrongfully asserted over another's property inconsistent with his ownership therein.'" *Warshall v. Price*, 629 So.2d 903, 904 (Fla. Dist. Ct. App.1994) (citation omitted); *Pearson v. Ford Motor Co.*, 694 So.2d 61, 69 (Fla. Dist.

Ct. App. 1997); *see also Special Purpose Accounts Receivable Co-op Corp. v. Prime One Capital Co.*, 125 F.Supp.2d 1093, 1099-1100 (S.D. Fla. 2000) (citing *Warshall v. Price*, 629 So.2d at 904). Florida courts are split as to whether a party must intend to deprive another of its property to find conversion. *See Small Business Admin. v. Echeverria*, 864 F.Supp. 1254, 1262 (S.D. Fla. 1994) (citing cases). Noting that "[t]he Florida Supreme Court has not set forth the elements of conversion in more than 40 years," the *Echeverria* court held that if "the Florida Supreme Court chose to revisit the issue, it would not disturb prior rulings holding that intent is a necessary element of conversion." *Id.* at 1262. Thus, the federal courts applying Florida law define conversion as a wrongful taking of property with "intent to exercise an ownership which is inconsistent with the real owners' right of possession." *Seibel v. Society Lease Inc.*, 969 F.Supp. 713 (M.D. Fla. 1997) (citations omitted).

PMC-SW contends that Dr. Humphrey wrongfully asserted dominion over PMC-SW's accounts receivable when she "directed Ms. Guerin[15] to alter the computer code from Doctor #7 . . . to Doctor #77 so that these accounts could be billed to the insurance companies and collected in her own name." PMC-SW Brief, pp. 10-11. According to PMC-SW, this constituted conversion.

In response, Dr. Humphrey contends that an account receivable was not generated until the conclusion of the provision of obstetrics services. *See* Humphrey Affidavit, ¶ 6. Thus, according to Dr. Humphrey, when she billed the insurance companies for obstetrics services related to former NMC patients that she continued to treat after she resigned as a NMC employee, the receivables were owned by her. In short, Dr. Humphrey disputes PMC-SW's allegation that a global receivable was

[15]Mary Guerin worked for NMC from June of 2000 through approximately May of 2001. Ms. Guerin then worked for Dr. Humphrey between May and July of 2001. Ms. Guerin was responsible for billing and financial matters for Dr. Humphrey's OB/GYN practice, both while Dr. Humphrey was a NMC employee and after her resignation. *See* PMC-SW Exhibit 3 (the "Guerin Affidavit").

created by NMC upon the patient's first obstetrics visit and that she was compensated by NMC for that receivable in the month following the patient's first visit. According to Dr. Humphrey, because an account receivable was not generated until the conclusion of patient services, the receivables for patients that she continued to treat after the termination of her employment with NMC were her receivables not NMC's. In addition, Dr. Humphrey contends that PMC-SW must come forward with evidence that it purchased these accounts receivable – *i.e.,* that PMC-SW actually owned them. *See* Defendant's Brief in Support of Motion ("Humphrey Brief"), p. 15.

As to the contention that PMC-SW must put forth evidence that it owned the accounts receivable at issue in the Complaint, the Court finds evidence in the record to support PMC-SW's ownership. According to both the documentary evidence and the Estes Affidavit, PMC-SW purchased *all* of NMC's accounts *every* month. *See* Service Agreement, ¶¶ 7.2, 7.4; Estes Affidavit, ¶ 3. Moreover, the Employment Agreement appointed PMC-SW as Dr. Humphrey's attorney-in-fact to bill and collect the accounts receivable generated by her. *See* Employment Agreement, ¶ 6; Estes Affidavit, ¶ 10. There is no evidence to the contrary. While there is a factual dispute as to when an account receivable was generated (that PMC-SW could then purchase in accordance with the Service Agreement), the summary judgment record contains some evidence supporting PMC-SW's contention that NMC booked a global receivable upon the obstetrics patient's first visit that PMC-SW then purchased and paid for in accordance with the Service Agreement. Thus, this portion of Dr. Humphrey's argument fails.

As to Dr. Humphrey's argument that an account receivable was not generated until the baby was delivered, as just noted, there is conflicting evidence in the summary judgment record. Thus, a genuine issue of material fact exists regarding when an account receivable was created that would

be available for purchase by PMC-SW under the Service Agreement. Dr. Humphrey's affidavit directly contradicts the Estes Affidavit and the Guerin Affidavit. If Dr. Humphrey is correct, there were no accounts receivable to convert for patients who had not yet delivered. Moreover, PMC-SW's own documents raise questions about the date the receivable was generated. *See* PMC-SW Exhibit 1(A). For example, with respect to the entry for one of the patients at issue, the document notes a "date of service" as 7/19 (after Dr. Humphrey resigned), but then groups this entry under "Total Charges for 12/4/00" (before Dr. Humphrey resigned). *See* PMC-SW Exhibit 1(A), p. 3. The Court cannot reconcile the dates of service with the date the service was "booked."

Finally, there is conflicting evidence as to who directed the change in the doctor billing codes from Doctor #7 to Doctor #77. PMC-SW contends that Dr. Humphrey unilaterally made this change, but the Guerin Affidavit suggests that it is possible that NMC authorized the change in coding. The Guerin Affidavit states that "[w]hen she terminated her relationship with the Naples Medical Center, the Medical Center allowed her to use the Naples Medical Center computer and was identified [sic] as Doctor #77." Guerin Affidavit, ¶ 5; Estes Deposition, pp. 37, 94. While Dr. Humphrey does not address who directed the coding change, a fact question remains as to who decided to change the coding and who was aware of the change.

The existence of these genuine issues of material fact preclude summary judgment in favor of Dr. Humphrey on the conversion claim.

3. Wage Overpayment (Unjust Enrichment) Claim

In the Complaint, PMC-SW contends that Dr. Humphrey owes it "approximately $455,000" for cash distributions and advances "under the doctrine of quantum meruit and to prevent unjust enrichment." Complaint, ¶ 56. As characterized by Dr. Humphrey in her brief in support of the

Motion, "[t]he primary focus of [PMC-SW's] claims against [Dr. Humphrey] is its assertion that it is entitled to recover in excess of Four Hundred Thousand and 00/100ths Dollars ($400,000.00) of wages which were 'overpaid' to Humphrey." *See* Humphrey Brief, p. 8. Dr. Humphrey then defends against the wage overpayment claim by moving to strike the Estes Affidavit as discussed *supra* at pp. 9-13[16] and by alleging that PMC-SW lacks standing to assert this claim "when she was neither employed by [PMC-SW] nor received any payment from [PMC-SW]." *See* Humphrey Brief, pp. 8-9.

In response to Dr. Humphrey's standing argument, PMC-SW relies upon the Assignment, pursuant to which NMC assigned its claims against Dr. Humphrey to PMC-SW. It is undisputed that while she was employed by NMC, Dr. Humphrey was entitled to be compensated in accordance with the terms of the Employment Agreement. If Dr. Humphrey was "overpaid" by NMC under the Employment Agreement, that claim would belong to NMC, Dr. Humphrey's employer. However, PMC-SW now owns that claim in accordance with the terms of the Assignment. Although a contractual right to recover alleged overpayments to Dr. Humphrey was not specifically pled in the Complaint, the Assignment was introduced into the summary judgment record by PMC-SW in response to Dr. Humphrey's contention that PMC-SW lacked standing to bring the claims set forth in the Complaint (which Dr. Humphrey herself characterized as wage overpayment claims).[17]

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[16]As noted previously, the Court concludes that the Estes Affidavit is competent summary judgment evidence.

[17]If summary judgment against PMC-SW on this claim was not being granted, and PMC-SW thereafter filed a motion for leave to amend the Complaint to conform the pleadings to that which was fully argued in connection with the Motion, the Court would likely grant the motion for leave to amend because leave to amend "shall be freely granted when justice so requires." F.R.C.P. 15(a). While the Court ultimately concludes that the contractual wage overpayment claim cannot survive the Motion, PMC-SW clearly had standing to pursue it once NMC's claims against Dr. Humphrey were assigned to it.

Thus, the Court will consider the wage overpayment claim in two ways. First, is PMC-SW entitled to recover allegedly overpaid wages based upon the relevant contracts – *i.e.*, the Employment Agreement, the Service Agreement, and the Assignment? Alternatively, is PMC-SW entitled to recover allegedly overpaid wages based upon the legal theory of unjust enrichment or quantum meruit? Each alternative is discussed further below.

Regarding the contractual wage overpayment claim, PMC-SW contends that it is entitled (as NMC's assignee) to recover overpayments in compensation to Dr. Humphrey over the entire term of her employment. In response, Dr. Humphrey contends that by the time PMC-SW filed the Complaint (approximately fourteen months following the cessation of Dr. Humphrey's employment),[18] NMC had already lost the opportunity to make adjustments to her revenues; and thus, NMC had no reconciliation rights to assign to PMC-SW.

In support of its contention, PMC-SW points to the provision in the Employment Agreement that states:

> NMC and the Employee desire that the Employee be compensated on the basis of his or her individual contribution to the earnings of NMC. Accordingly, NMC and the Employee desire that the compensation of the Employee be computed on the basis of Revenue attributable to the Employee, including diagnostic and other ancillary services, less the direct costs incurred by NMC in providing such services and an equitable allocation of indirect costs and general overhead of NMC. Employee agrees that the 15% management fee of [PMC-SW] under [the Service Agreement] shall be treated as a direct cost to be charged against his compensation, and that his compensation may be estimated based on his billings, subject to reconciliation as described in the Service Agreement.

Employment Agreement, recital C. From there, PMC-SW points to the Service Agreement which

[18]Both parties agree that Dr. Humphrey ceased being a NMC-employee on February 22, 2001. *See* Humphrey Affidavit, ¶ 3; Estes Affidavit, ¶ 11. The Complaint was filed in April 2002.

provides that NMC shall have "complete control of and responsibility for the . . . compensation" of its medical professionals, as well as the sole responsibility for the professionals' salaries. Service Agreement, ¶¶ 4.2, 4.3. To fund NMC's payment of the doctors' salaries, PMC-SW "shall pay to NMC . . . the NMC Distribution amounts on or about the 15th day of such following month. Some amounts may need to be estimated, with Adjustments made as necessary the following month." Service Agreement, ¶ 7.2. "Adjustments" is a defined term meaning:

> [U]ncollectible accounts, discounts, contractual adjustments, Medicare allowances, Medicaid allowances, and professional courtesies. Adjustments shall be estimated based upon the historical collection experiences of various payment classifications. Adjustments shall be reconciled on a quarterly basis based upon actual collections within these same payment classifications, with any amounts due NMC or [PMC-SW] as the case may be, being reflected in the following month's distributions.

Service Agreement, ¶ 11.1.[19] From these provisions, PMC-SW concludes that it is entitled to adjust Dr. Humphrey's compensation over the life of her employment.

The Court disagrees. The Service Agreement clearly requires a quarterly reconciliation process. No provision in the Service Agreement or the Employment Agreement authorizes adjustments beyond those to be taken quarterly.

Moreover, from PMC-SW's perspective, the quarterly reconciliation process provided for in the Service Agreement should be self-effectuating. For example, if PMC-SW was entitled to an "Adjustment" for the fiscal quarter ending March 31, 2001 (presumably the last quarter of Dr. Humphrey's employment by NMC), and that "Adjustment" resulted in a determination that PMC-

[19]Paragraph 11.1 contains a grammatical error. The definition of Adjustments does not contain the word "mean," *i.e.*, the definition begins, "Adjustments shall uncollectible . . . ." Service Agreement, ¶ 11.1. All of the other contractually-defined terms read "shall mean." Thus, the Court will read the definition of Adjustments as if it contained the word "mean."

SW had overpaid for receivables purchased from NMC during the first quarter of 2001, under the terms of the Service Agreement, PMC-SW was to deduct the overpayment amount from the Clinic Distribution otherwise due to NMC in April 2001 (which enabled PMC-SW to self-collect its prior overpayments). In turn, if NMC received a lesser Clinic Distribution in April 2001 due to an "Adjustment" authorized under the Service Agreement, it was entitled to reduce the compensation otherwise to be paid to NMC's physician employees pursuant to their employment agreements. Thus, as to physicians still employed by NMC, the recovery of the overpayment would also be self-effectuating – *i.e.*, NMC could reduce the compensation otherwise to be paid to the physician in that month and could self-collect its prior overpayments. However, as to terminated employees, like Dr. Humphrey, there would be no further compensation owing against which the prior overpayments could be deducted and a claim for reimbursement would lie.

Thus, as relevant here, if PMC-SW made an "Adjustment" to a Clinic Distribution during the first quarter of 2001 under the Service Agreement which resulted in a loss of revenue to NMC in the month following the quarter's end, for which NMC was entitled to recover that loss from Dr. Humphrey under the Employment Agreement, then PMC-SW, as NMC's assignee, is entitled to assert a claim for reimbursement against Dr. Humphrey. However, there is no evidence in the summary judgment record that PMC-SW made an "Adjustment" to a Clinic Distribution after the first quarter of 2001 which would entitle NMC to adjust compensation paid to Dr. Humphrey. In the absence of evidence of the predicate "Adjustment," PMC-SW has failed to support its entitlement to assert a contractual wage overpayment claim against Dr. Humphrey as assignee of NMC under the Employment Agreement.

For these reasons, summary judgment in favor of Dr. Humphrey on the contractual wage

overpayment claim is appropriate.

Turning next to the alternative basis for its alleged wage overpayment claim, PMC-SW contends that it is entitled to recover on an unjust enrichment or quantum meruit theory.[20] In short, PMC-SW contends that Dr. Humphrey was unjustly enriched by PMC-SW's incorrect adjustments to the Clinic Distribution, and NMC's subsequent overpayment of compensation to her.

Under Florida law, to prove a claim for unjust enrichment, PMC-SW must demonstrate that: (1) PMC-SW conferred a benefit on Dr. Humphrey, who had knowledge of the benefit; (2) Dr. Humphrey accepted and retained the conferred benefit; and (3) under the circumstances it would be inequitable for Dr. Humphrey to retain the benefit without paying for it. *See Timberland Consolidated P'ship v. Andrews Land & Timber, Inc.*, 818 So.2d 609, 611 (Fla. Dist. Ct. App.), *reh'g denied* (2002); *Commerce P'ship 8090 L.P. v. Equity Contracting Co.*, 695 So.2d 383, 386 (Fla. Dist. Ct. App. 1997). The theory of unjust enrichment:

> [I]s a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property of benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

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[20]Florida courts use the terms quasi contract, quantum meruit, and unjust enrichment interchangeably. *See, e.g., Doug Hambel's Plumbing, Inc. v. Conway*, 831 So.2d 704 (Fla. Dist. Ct. App. 2002); *Commerce P'ship*, 695 So.2d 383 (Fla. Dist. Ct. App. 1997). In addition, according to a legal treatise:

> [W]hile recovery for unjust enrichment is based upon the inequity of allowing a defendant to retain a benefit without paying for it, recovery in quantum meruit is based upon an implied contract to pay reasonable compensation for services rendered. Nevertheless, some jurisdictions refer to the terms "unjust enrichment" and "quantum meruit" interchangeably as allowing for the recovery of damages on a contract that has been implied in equity. It has been said that the doctrines of "unjust enrichment" and "restitution" – modern terms – have largely supplanted the designation of "quasi-contracts."

66 AM. JUR. 2D, *Restitution and Implied Contracts* § 6.

66 AM. JUR. 2D, *Restitution and Implied Contracts* § 3. Restitution is required when the unjust enrichment is "received under circumstances that give rise to a legal or equitable obligation to account therefor." *Timberland*, 818 So. 2d at 611 (citing *Lowry*, 463 So. 2d 540, 541 (Fla. Dist. Ct. App. 1985) and 66 AM. JUR. 2D, *Restitution and Implied Contracts* § 3 (1973)).

In support of its unjust enrichment claim, PMC-SW contends that because the reconciliation process contemplated by the Service Agreement was unfair to PMC-SW (because it did not accurately capture those adjustments necessary to ensure that PMC-SW only paid for collectible receivables), the Clinic Distribution to NMC and subsequent payments by NMC to physicians were overstated. According to PMC-SW, these overstated distributions caused a substantial financial loss to it and caused Dr. Humphrey to be unjustly enriched. Thus, PMC-SW argues that even though a contract governed PMC-SW's payment of Clinic Distributions to NMC, and separate contracts governed NMC's payments to physicians, including Dr. Humphrey, equity requires Dr. Humphrey to make restitution to PMC-SW for the alleged overpayment of her compensation by NMC. In short, PMC-SW contends that Dr. Humphrey was unjustly enriched by PMC-SW's economic loss on the Service Agreement.

The Court disagrees for several reasons. First, as a matter of law, no claim for unjust enrichment lies when express contract(s) covering the same subject exist. *See May v. Sessums & Mason, P.A.*, 700 So.2d 22, 28 (Fla. Dist. Ct. App. 1997), *rev. denied*, 705 So. 2d 571 (Fla. 1998) (legal fiction of quantum meruit "cannot be maintained [] when the rights of the parties are described in a written contract."); *Snyderburn v. Moxley*, 652 So.2d 945, 947 (Fla. Dist. Ct. App. 1995), *rev. denied*, 659 So. 2d 1085 (Fla. 1995) (where express agreement exists, quantum meruit is not available because the "rights and obligations of the parties are governed by the agreement"); *Hoon*

v. Pate Construction Co., Inc., 607 So.2d 423, 427 (Fla. Dist. Ct. App. 1992), *rev. denied*, 618 So. 2d 210 (Fla. 1993) (implied contract will not be recognized when the rights of parties are set out in written documents; to do so would "emasculate" the contractual provisions).

The law does not provide for an extra-contractual claim when the Service Agreement and Employment Agreement expressly address the issue allegedly giving rise to the unjust enrichment claim. The subject of PMC-SW's unjust enrichment claim – *i.e.*, Adjustments to the Clinic Distribution and subsequent payments flowing to physicians from the Clinic Distribution, is dealt with in the written agreements between the parties. By the terms of those agreements, reconciliations were to be made quarterly. PMC-SW cannot use an equitable legal theory to end run the express limitations in the agreements. If PMC-SW wished to modify the terms of the Service Agreement, it was required to negotiate such a modification with NMC, who in turn would have been required to obtain the agreement of the physicians to a modification of their employment agreements. These contracts cannot be modified except by a signed writing. *See, e.g.,* Employment Agreement, ¶ 17; Service Agreement, ¶ 12.19. NMC did not agree to such a modification of the Service Agreement, and Dr. Humphrey did not agree to such a modification of the Employment Agreement. Instead, PMC-SW is attempting to use a claim of unjust enrichment to unilaterally modify the contracts. Such an attempt must legally fail.

Second, to maintain a claim of unjust enrichment, PMC-SW must show that Dr. Humphrey knew of the benefit, and that it would be inequitable or unjust for her to retain that benefit. There is no evidence in the summary judgment record that Dr. Humphrey knew that she was being overpaid by NMC because of inadequate "Adjustments" to the Clinic Distribution by PMC-SW. Moreover, there is no evidence that it would be inequitable or unjust for Dr. Humphrey to retain the

compensation paid to her by NMC, apparently calculated pursuant the contractual formula provided in the Employment Agreement, because PMC-SW made a bad bargain in its contract with NMC. In fact, the reverse is true. An injustice would result here if PMC-SW is permitted to look back over the life of the employment relationship between NMC and Dr. Humphrey and recover payments made to Dr. Humphrey when there is no evidence to suggest that she knew she was being overpaid at the time she received the monies now in dispute.[21]

In summary, the Court concludes that PMC-SW made a bad business deal from which it wants relief. However, PMC-SW and NMC were sophisticated parties. They negotiated the anticipated financial outcome of the Service Agreement, and the Service Agreement's relationship to the individual employment agreements with the physicians. While it is unfortunate that PMC-SW incurred financial hardship caused by the faulty adjustment/reconciliation process provided for in the contracts, the drafting error falls at the feet of the drafters, not Dr. Humphrey. *See RX Solutions, Inc. v. Express Pharmacy Servs., Inc.*, 746 So.2d 475, 477 (Fla. Dist. Ct. App. 1999) ("The courts are powerless to rewrite contracts to make them more advantageous for one of the contracting parties, particularly in a situation when the party is the drafter, against whom the agreement must be construed.") (citation omitted). Moreover, since those contracts expressly addressed the basis upon which reconciliations of estimated payments to actual collections were to occur, PMC-SW's alternative theory to recover the alleged wage overpayments – *i.e.*, unjust enrichment, also fails.

[21]PMC-SW argued at the June 4, 2003 hearing that Dr. Humphrey was required to notify NMC (who could then notify PMC-SW) about uncollectible accounts or other information that would aid PMC-SW in better estimating the "Adjustments" to be made to the Clinic Distribution. When pressed, however, PMC-SW could not point to any provision in the Service Agreement or the Employment Agreement that contained such a requirement.

4. Fraud Claims

PMC-SW contends that Dr. Humphrey "fraudulently concealed her intent to abandon her employment obligations to the Clinic, retain the overpayments made to her and thereby rob PMC-SW of its right to reimbursement of the overpayments." Complaint, ¶ 53. Moreover, PMC-SW contends that Dr. Humphrey committed a fraudulent omission by altering (or having her Mary Guerin, acting as her agent, alter) her doctor number in NMC's computerized billing system after her employment with NMC terminated so that insurance payments were diverted to her for which she had already been compensated by NMC. *See* Complaint, ¶ 53. While PMC-SW relies upon a fraudulent concealment or omission legal theory to support each contention, they will be analyzed separately below.

Under Florida law, a fraudulent concealment or omission occurs "where one party having superior knowledge intentionally fails to disclose a material fact, which is not discoverable by ordinary observation, especially where coupled with a trick or artifice." *Nessim v. DeLoache*, 384 So.2d 1341, 1344 (Fla. Dist. Ct. App.1980). However, a cause of action for fraud based on a failure to disclose exists only when a duty to make such disclosure exists. *See Friedman v. Am. Guardian Warranty Servs., Inc.*, 837 So.2d 1165, 1166 (Fla. Dist. Ct. App. 2003) ("Fraud based upon a failure to disclose material information exists only when a duty to make such disclosure exists."); *TransPetrol, Ltd. v. Radulovic*, 764 So.2d 878, 879-80 (Fla. Dist. Ct. App. 2000) ("A defendant's knowing concealment or non-disclosure of a material fact may only support an action for fraud when there is a duty to disclose.").[22] "[S]uch duty arises when one party has information that the other

[22]The *TransPetrol* court distinguishes *Nessim*. In *Nessim*, the court held that the seller of a yacht committed fraud by telling the buyer that the yacht was in good condition even though the seller knew of latent defects. The court did not mention the duty to disclose element of fraudulent omission, stating only that "where one party having

party has a right to know because of a fiduciary or other relation of trust or confidence between them." *State v. Mark Marks, P.A.*, 654 So.2d 1184, 1189 (Fla. Dist. Ct. App. 1995), *approved by*, 698 So.2d 533 (Fla. 1997).

A fiduciary relationship is "based on trust and confidence between the parties where 'confidence is reposed by one party and a trust accepted by the other . . . .'" *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 2003 WL 158888, at *3 (Fla. Dist. Ct. App. January 24, 2003) (quoting *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002)). A fiduciary duty can be implied in law based on the specific circumstances surrounding the relationship, *see Capital Bank v. MVB, Inc.*, 644 So.2d 515, 518 (Fla. Dist. Ct. App. 1994), *rev. denied*, 659 So. 2d 1086 (Fla. 1995), but when the parties are dealing at arm's length, "a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *See Taylor*, at *3-4 (citing *Watkins v. NCNB Nat'l Bank of Fla., N.A.*, 622 So.2d 1063, 1065 (Fla. Dist. Ct. App. 1993), *rev. denied*, 634 So.2d 629 (Fla. 1994); *Maxwell v. First United Bank of Daytona Beach*, 782 So.2d 931, 933-34 (Fla. Dist. Ct. App. 2001); *Capital Bank,* 644 So.2d at 518-19; *Morton v. Young*, 311 So.2d 755, 756 (Fla. Dist. Ct. App. 1975)); *see also Cripe v. Atlantic First Nat'l Bank*, 422 So.2d 820 (Fla. 1982). "The fact that one party places trust or confidence in the other does not create a confidential relationship in the absence of some recognition, acceptance or undertaking of the duties of a fiduciary on the part of the other party." *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 179 (S.D. Fla. 1991) (applying Florida law).

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superior knowledge intentionally fails to disclose a material fact, which is not discoverable by ordinary observation, especially where coupled with a trick or artifice." 348 So.2d at 1344. The *TransPetrol* case notes that the *Nessim* court's statement of law is correct when the seller intended for the buyer to rely on the seller's representation and attendant omission, but that a pure action for fraud based on omission requires a duty to disclose. *See TransPetrol*, 764 So.2d at 880.

Ordinarily, summary judgment is inappropriate in the context of fraud because:

> [B]eing a subtle matter, fraud requires a full explanation of the facts and circumstances of the alleged wrong to permit a determination whether they collectively constitute fraud, and for that reason such determination is seldom one that can be made in a legally sufficient manner without a trial.

Ward v. Atlantic Security Bank, 777 So.2d 1144, 1146 (Fla. Dist. Ct. App. 2001). Nevertheless, PMC-SW must raise a genuine issue of material fact on each of the elements of its fraudulent concealment or omission claim.

As to the first fraud claim (that Dr. Humphrey "fraudulently concealed her intent to abandon her employment obligations to the Clinic, retain the overpayments made to her and thereby rob PMC-SW of its right to reimbursement of the overpayments"), there is no evidence in the summary judgment record to support a finding that Dr. Humphrey owed a duty to disclose her intent to resign to PMC-SW. Moreover, there is no evidence to support a finding that the relationship between PMC-SW and Dr. Humphrey was that of fiduciaries or one of trust and confidence. Specifically, there is no evidence that: (i) PMC-SW was charged with acting for the benefit or protection of Dr. Humphrey, and vice versa, (ii) either party exhibited a degree of dependency upon the other; (iii) either party undertook to advise, counsel or protect the other, and/or (iv) PMC-SW placed its trust in Dr. Humphrey, or that Dr. Humphrey recognized receipt of this trust. PMC-SW and Dr. Humphrey had no direct relationship. While the interplay between the Service Agreement and the Employment Agreement created an indirect connection between PMC-SW and Dr. Humphrey, this connection does not rise to the level of a fiduciary or trust relationship. Thus, Dr. Humphrey had no duty to inform PMC-SW of her intent to resign prior to her resignation.

Moreover, there is no evidence of Dr. Humphrey's knowledge of the flawed reconciliation

process as to obstetrics billings. As Dr. Humphrey testified, she decided to resign after learning that NMC planned to seek $522,000 in "overpayments" from her. Humphrey Affidavit, ¶ 7. As noted by Dr. Humphrey, "[t]he length of time in which the Employment Agreement was in effect seemingly negates [PMC-SW's] fraud allegation. However, to remove any uncertainty, I never had any intent other to faithfully perform the employment contract." *Id.* PMC-SW has not come forward with any evidence to the contrary.

For these reasons, PMC-SW has failed to raise questions of fact on its first fraud claim and summary judgment in Dr. Humphrey's favor is appropriate.

As to the second fraud claim (that Dr. Humphrey committed a fraudulent omission by altering (or having Mary Guerin, acting as her agent, alter)) her doctor number in NMC's computerized billing system after her employment with NMC terminated so that insurance payments were diverted to her for which she had already been compensated by NMC), PMC-SW contends that Dr. Humphrey's "failure to disclose her wrongful intentions and activities constitutes a material omission of fact upon which [PMC-SW] relied to its detriment," and that "[u]nder the circumstances, [Dr. Humphrey] owed a duty to disclose her wrongful actions to [PMC-SW] and her failure to disclose constitutes a fraudulent misrepresentation." Complaint, ¶ 53. According to PMC-SW, Dr. Humphrey intended that PMC-SW rely upon her silence so that she could collect on accounts for which she had already been paid. *See* Complaint, ¶ 53.

Again, to prevail on this fraudulent concealment or omission claim, PMC-SW must prove that Dr. Humphrey owed a duty to disclose to PMC-SW based on a fiduciary or trust relationship between them. *See* pp. 26-27, *supra*. As was true with the first fraud claim, there is simply no evidence in the summary judgment record to establish a duty to disclose running from Dr. Humphrey to PMC-SW.

See p. 27, *supra*. Because there is no evidence of a duty to disclose, PMC-SW has failed to carry its burden of proof in connection with the Motion and a summary judgment in Dr. Humphrey's favor on the second fraud claim is also appropriate.

5. Turnover & Accounting Claims

Relying on 11 U.S.C. § 542, PMC-SW seeks an order from the Court directing Dr. Humphrey and "to turn over or account for" accounts receivable and/or proceeds of accounts receivable it contends were owned by PMC-SW and were collected by Dr. Humphrey. *See* Complaint, ¶¶ 27-29. While it is true that § 542(a) of the Bankruptcy Code compels those in possession of property of the estate to turnover such property to the debtor in possession (here, PMC-SW), *see In re Graven*, 138 B.R. 587, 590 (Bankr. W.D. Mo. 1992), *aff'd*, 64 F.3d 453 (8th Cir. 1995) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983)), disputed questions of fact exist regarding whether Dr. Humphrey is in possession of property of the PMC-SW bankruptcy estate.

In short, PMC-SW's turnover and accounting claims turn on a resolution of PMC-SW's conversion claim. If Dr. Humphrey converted PMC-SW's accounts receivable as PMC-SW contends, then a turnover of those accounts or the proceeds of those accounts and an accounting of receivables paid to Dr. Humphrey on behalf of former NMC patients is appropriate. Since the Court cannot dispose of the conversion claim by summary judgment, the Court cannot dispose of the turnover and accounting claims by summary judgment.

6. Violation of the Automatic Stay Claim

PMC-SW asserts a claim for actual damages, costs, attorneys' fees and punitive damages pursuant to 11 U.S.C. § 362(h). PMC-SW alleges that Dr. Humphrey "knowingly, intentionally and wrongfully converted the property of the Debtor" in violation of the automatic stay imposed under

§ 362(a)(3). Complaint, ¶¶ 57-58.

Section 362(a)(3) prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Section 362(h) enforces subsection (a) by authorizing the recovery of "actual damages, including costs and attorneys' fees, and in appropriate circumstances . . . punitive damages" for "any willful violation" of the automatic stay. 11 U.S.C. § 362(h). "Willfulness within the context of an alleged stay violation is almost universally defined to mean intentional acts committed with knowledge of the bankruptcy petition." *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 124-25 (Bankr. N.D. Tex. 2003) (citing *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269-70 (1st Cir. 1999) and *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484, 488-89 (N.D. Tex. 1999)).

There is no evidence in the summary judgment record that Dr. Humphrey had actual knowledge of PMC-SW's bankruptcy filing. In the absence of such actual knowledge, Dr. Humphrey cannot be liable for a willful violation of the automatic stay. Because PMC-SW failed to come forward with some evidence that Dr. Humphrey had actual knowledge of the pendency of PMC-SW's bankruptcy case, Dr. Humphrey is entitled to a summary judgment on this claim.

7. Attorneys' Fees Claim

At best, PMC-SW's claim for attorneys' fees depends on the outcome of the underlying claim. Since summary judgment is being granted in Dr. Humphrey's favor on all claims except the conversion claim and the turnover and accounting claims, the Court will only analyze PMC-SW's right to recover attorneys' fees with respect to those claims. In other words, if PMC-SW prevails on the conversion claim and the turnover and accounting claims at trial, is it legally entitled to recover its reasonable attorneys' fees?

Under Florida law, recovery based on the tort of conversion does not include a recovery of attorneys' fees. *See Ocean Trasp. Corp.*, 213 B.R. 383, 387 (Bankr. N.D. Fla. 1997) (under Florida law, damages for conversion consist of value of property at time of conversion); FLA. STAT. ch. 59 § 59.46 (an award of attorneys' fees is predicated on an express statutory or contractual provision); *see also* 18 AM. JUR. 2d, *Conversion* § 120 ("As a general rule, in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses incurred by the plaintiff . . . in the litigation of his claim against the defendant . . . are not recoverable as an item of damages in an action for the conversion of personal property."). Therefore, even if PMC-SW prevails at trial on its conversion claim, it is not entitled to recover attorneys' fees on that claim.

PMC-SW's request to recover attorneys' fees in connection with its turnover and accounting claims can also be disposed of at this time. The turnover claim arises under the Bankruptcy Code. As such, the general rule in federal court, the so-called "American Rule," is that attorneys' fees may not be awarded in the absence of express statutory authority or a contractual provision entitling the party to such a recovery. *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Res.*, 532 U.S. 598, 602 (2001); *Alaska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Crain v. Limbaugh (In re Limbaugh)*, 155 B.R. 952, 961 (Bankr. N.D. Tex. 1994); *see generally,* 20 AM. JUR. 2d, Costs § 59. As there is no statutory basis for an award of attorneys' fees for bringing a turnover and/or accounting claim under the Bankruptcy Code, *see Leverette v. NCNB South Carolina*, 118 B.R. 407 (Bankr. D. S.C. 1990), even if PMC-SW prevails at trial on this claim, it is not entitled to recover attorneys' fees.

Thus, as a matter of law, the Motion is granted regarding PMC-SW's request that it recover its reasonable attorneys' fees.

Finally, with respect to Dr. Humphrey's request in the Motion for an award of attorneys' fees associated with the defense of the Complaint, the Court also concludes that she is not entitled to such an award. Dr. Humphrey contends that she is entitled to recover her fees because the Complaint is "groundless and in bad faith." Motion, p. 4.

As previously noted, the American Rule generally provides that absent statutory authority or agreement of the parties, each party must bear its own fees. However, "even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bad faith." *Christianburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978). In the Fifth Circuit, "the very rationale underlying 'fee-shifting' pursuant to the bad faith exception to the American Rule is considered punitive and therefore attorney's fees will only be awarded for sufficiently offensive conduct during litigation . . . ." *Sidag Aktiengesellschaft v. Smoked Foods Products Co., Inc.*, 854 F.2d 799, 801 (5th Cir. 1988), *reh'g denied*, 966 F.2d 674 (1992). Therefore, "absent statutory authority," before attorney's fees may be granted to a party, "there must be a showing the case was prosecuted in bad faith, frivolous, or for oppressive reasons." *Id.*

There is no evidence that PMC-SW filed the Complaint in bad faith. While summary judgment in Dr. Humphrey's favor on certain of the claims is appropriate, the claims were not frivolous or brought for oppressive reasons. Thus, Dr. Humphrey's request for attorneys' fees is denied.

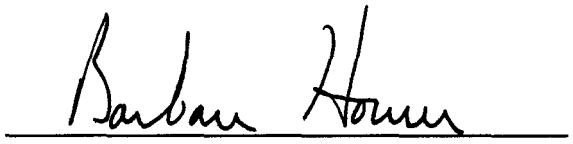
III. Conclusion

The Motion is granted in part and denied in part. The Motion is granted as to the wage overpayment (unjust enrichment) claim, the first fraud claim and the second fraud claim, the willful

violation of the automatic stay claim, and the attorneys' fees claim. The Motion is denied as to the conversion claim and the turnover and accounting claims. Finally, Dr. Humphrey is not entitled to recover her attorney's fees.

An Order consistent with this Memorandum Opinion will be entered separately.

Signed: August 12, 2003.



Barbara J. Houser
United States Bankruptcy Judge